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The role of regional legal  
orders in the making of a  
global migratory framework

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Author Elisa Fornale, © The role of regional legal orders in the making of a global migratory framework

**Abstract**

*Regional migration governance is gaining momentum in different academic disciplines. Recent legal developments reveal how regional approaches to regulate migratory flows are proliferating with specific variations that reflect different negotiating priorities. The central focus of the paper is to understand how developing regional legal regimes, may accomplish broader goals, and overcome normative challenges, such as increasing the human rights protection of migrants or promoting free movement of individuals. The main research question is: How might regional legal regimes impact the human rights–migration nexus? To address these issues the paper conducted a legal analysis of ASEAN and MERCOSUR, using them as regional test laboratories for the development of migration standards.*

**Keywords**

*Regional migration governance - free movement - human rights protection – ASEAN – MERCOSUR*

## 1. Introduction

In his inaugural lecture, Bethlehem drew attention to emerging cross-border areas, noting that their “self-evidently trans boundary, geography-defying quality”,<sup>1</sup> including with respect to human mobility, challenged the traditional geography of international law. Although these threats are hardly new – in fact, large movements of people are part of human history – they are increasingly escaping the “confines of an outdated legal system”.<sup>2</sup> This also has direct implications for identifying legal domains: as recalled by Crawford, the “diversity of the world” is not “just physical – a function of geography, climate and ecosystems – or cultural – arising from a plurality of peoples with their own histories, traditions and beliefs. It is evident also in the domain of law”.<sup>3</sup>

There is progressive development of a regional approach, even for dealing with issues of “global concern”, and this introduction makes reference to the contemporary debate on the role played by issues of geography in the system of international law to explore the progressive role of regionalism in moving the legal borders, in particular those of the domestic domain.<sup>4</sup>

There is “voluminous” research on regionalism predominantly focused on the field of international relations. The “multidimensionality and pluralism” of this process makes it ever more difficult to reach a common definition.<sup>5</sup> Most scholars engaged in the debate seem to agree that there is not a pre-given or natural region, but that “definitions vary according to the particular problem or question under investigation”.<sup>6</sup> Soderbaum notes “how regionalism means different things to different people”.<sup>7</sup>

This paper builds on this rich literature to turn to a legal analysis and identify how regional initiatives on standards affect the development of the global migratory framework. In particular, it aims to explore how different normative layers interact in the context of multi-level migration governance by focusing on three processes: international law–regional law; regional law–domestic law; international law–domestic law. The guiding question is how regionalism can have an impact in promoting and developing universalism by focusing on the

1 Bethlehem, Daniel, “The end of geography: the changing nature of the international system and the challenge to international law”, *European Journal of International Law*, 25 (1), 2014, 9-24.

2 Landauer, Carl, “Regionalism, Geography, and the International Legal Imagination”, *Chicago Journal of International Law*, 11 (2), 2014, 557-595.

3 Crawford, J., *Universalism and regionalism from the perspective of the International Law Commission*, 99- 121.

4 Bethlehem, 2014.

5 Soderbaum, Theories of regionalism, in Beeson M. and Stubbs R. (eds), *Routledge Handbook of Asian Regionalism*, 2012, 11-22.

6 Soderbaum, 2012.

7 Soderbaum, 2012.

way in which regionalism can facilitate the adoption of new solutions that the sovereign state is not capable of implementing by itself.

To this end, this paper attempts to look at contemporary expressions of regionalism by conducting an in-depth legal analysis of the normative development of two geographical contexts, namely, the Southern Common Market (MERCOSUR) and the Association of Southeast Asian Nations (ASEAN).

As described later, although the nature and history of these processes is different, Cremona et al. highlighted that “comparative law is one of the few real-life laboratories that we have in which to assess and understand the operation of different legal and institutional models designed to tackle similar objectives and problems”.<sup>8</sup> This fosters the development of a double analysis: the “divergence” of similar phenomena (to identify unique elements of each regional project) and their “convergence”, by including them into a broader trend (the development of global migration governance).<sup>9</sup> The analysis of these two processes will be completed by bringing into the debate the impact of regional processes at the domestic level. The third section of the paper will consider the progressive impact of regionalism on two states (Argentina and Thailand).

With respect to the methodology, the paper includes the thematic analysis of 31 interviews conducted during fieldwork in Bangkok (17 interviews), Argentina (12 interviews) and Geneva (3 interviews). The interviews included various key stakeholders: international organizations (e.g. International Labour Organization, United Nations Research Institute for Social Development (UNRISD), United Nations Economic Commission for Latin America and the Caribbean (CEPAL), United States Agency for International Development (USAID), Forum Human Rights MERCOSUR), academic experts in migration studies, government officials (Ministry of Trade) and migrant workers from member states within and outside the study regions (from Myanmar, Philippines, Japan, Colombia, Peru, Chile, Italy, Belgium, and Germany). The identity of the interviewees and of the organizations has been anonymized.

## **2. The role of regional processes: “stumbling blocks or building blocks”<sup>10</sup> in international law?**

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8 Cremona, Ma., Kleimann, D., Larik, J., Lee., R., Vennesson, P. (eds), *ASEAN’s External Agreements, Law, Practice and the Quest for Collective Action*, Cambridge, 2015.

9 Cremona et al., 2015.

10 This phrase was adopted by Bhagwati J. (Jagdish Bhagwati, *The World Trading System at Risk*, 1991).

There is a growing body of literature that focuses on regionalism in different disciplines. As recently stated by Bozel in the “Oxford Handbook on Comparative Regionalism”, more than 25 years’ worth of literature is available on this subject.<sup>11</sup>

Not only international relations theorists, but also international law scholars have refrained from using a rigid legal definition of region, as argued by Boisson de Chazournes “la region est un concept pour le moins énigmatique et aucune discipline scientifique ne peut en livrer un concept proprement objectif”.<sup>12</sup> The fluidity and uncertainty of this concept legitimates the co-existence of a large variety of regional integration models.<sup>13</sup>

The interest of this paper lies in advancing the understanding of the interaction between regionalism, expressed as a formal process, and universalism<sup>14</sup> from a legal perspective, and how the regional and international layers co-exist to develop tools to cope with the practical challenges of this complex relationship, such as the progressive increase of cross-border migratory flows. This not a new topic:<sup>15</sup> the conventional debate in international law has been developed on various aspects of the compatibility between regionalism and universalism. As Dolzer asked in 1984 “is there a substantive point indicating that regional groups have a specific role to play in the building of a future world?”<sup>16</sup> Again, according to Nicolas Politis, “nous nous acheminons vers l’universalisme par le régionalisme” and “le régionalisme n’est pas un moment historique dans un long cheminement vers l’universalité?”.<sup>17</sup>

First, it is relevant to review the current understanding of this concept to gain a new perspective on its significance and its implications for international law in the contemporary normative scenario.

11 T. Bozel (ed.), Oxford Handbook on Comparative Regionalism, 2016.

12 Boisson de Chazournes Laurence, Interactions between Regional and Universal Organizations – A Legal Perspective (Brill Nijhoff), 2016; see also Dubouis Louis, Les rapports du droit regional et du droit universel, in Régionalisme et universalisme dans le droit international contemporain : colloque de Bordeaux / [organisé par la] Société Française pour le Droit International. Paris : A. Pedone [copy. 1977]

13 Dutheil de la rochere, Mondialisation et regionalisation, in E. Loquin and C. Kessedjian (eds.), La Mondialisation du droit (Paris, Lite, 2000), 435-53.

14 See the study conducted by Behr T. and Jokela J., Regionalism and Global Governance: the emerging agenda, Notre Europe Studies and Research n. 85, 2011.

15 See for instance Jenks Wilfred, The conflic of law-making treaties, British Yearbook of International Law, 401, 1953. He argues “in the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.”

16 Dolzer, Universalism and regionalism, in Grahl Madsen, A. and Toman, J. (eds.) The spirit of Uppsala (Berlin, de Gruyter) 1984, 513.

17 Politis,

An interesting attempt to define the legal significance of regionalism was developed by Crawford.<sup>18</sup> In his preliminary study conducted for the International Law Commission in 1997 he used regionalism to refer “to claims to special treatment by reference to (or regulatory systems based on) historical, economic or geographical sub-classification of States”.<sup>19</sup> He argued that many governments are oriented to develop regional approaches to deal with matters of “apparently universal concern” and this “reflects the fact that although the situation of every state or nation may be attributed to its ‘place in the world’, that ‘place’ tends first of all to be seen in terms of its immediate neighbours and its own region”.<sup>20</sup> In his analysis he also draws attention to the tendency towards regionalism in specific areas, such as human rights, where universal values are at stake and where there is a risk of facilitating the development of “tension or dialectic” with universalism.<sup>21</sup> He is quite sceptical about the relevance of this concept: in particular he points out that the International Law Commission has refrained from including regionalism in international law.<sup>22</sup>

Fawcett, adopting a historical perspective, offers a comparative overview of this concept by highlighting its “flexibility and evolving nature”.<sup>23</sup> Fawcett suggests a definition where the role of states as “regionalism’s gatekeeper” is still prominent and she suggests referring to Nye’s definition of a “region as a limited number of states linked by geography and interdependence and of regionalism as the formation of and policies pursued by inter-state groups based around regions”. She emphasizes in particular how the emergence of the so-called “new” regionalism<sup>24</sup> after the Cold War plays a significant role in defining the normative nature of global governance by establishing regionalism as “an integral part of the multilateral architecture”.<sup>25</sup> The literature identifies different models of integration with different institutional designs and objectives. As described by Fawcett, regional organizations are “treaty and charter-based giving them formal status in international law”.

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18 Crawford, Chance, Order, Change: The Course of International Law : General Course on Public International Law, 2014.

19 Crawford, J., Universalism and regionalism from the perspective of the International Law Commission, 99- 121, 1997.

20 Crawford, 1997.

21 Crawford, 1997.

22 Andemicael Berhanykun, Regionalism and the United Nations (UNITAR; 1979); International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (UN, August 2006).

23 Louise Fawcett, The History and Concept of Regionalism, European Journal of International Law, Conference Paper Series No. 4/2012, 2012.

24 The early debate on regionalism originated between the 1950s and the 1970s when different approaches emerged (federalism, functionalism, and neofunctionalism). Some scholars, such as Soderbaum, consider that the distinction between old and new regionalism is no longer so prominent. Contemporary regionalism focuses more on comparative analysis.

25 Fawcett, 2012.

Pulkowski also produced interesting reflections on the risk that regionalist approaches could affect (and “damage”) the unity of international law by concluding that regional law is a “sub-variant of particular international law, as such no more or less prone to creating disorder in the international system than other forms of particularism”.<sup>26</sup> Pulkowski clearly identifies the emerging relationship between regional norms and universal law by illustrating how regional law-making processes may support global norms or represent a first step in the development of global standards.<sup>27</sup>

Starting from these premises, the analysis seeks to explore the relationship of regionalism with universal international law. In particular, the aim is to conduct a specific analysis in the field of migratory regulations to help understand whether regionalist law can impact the development of universal law. We can still identify a “governance gap” in global migration governance and it is ever more important to include the regional level.<sup>28</sup> To this end, the following section will provide an overview of the two regional case studies starting from their origin and institutional evolution.

## MERCOSUR

The Common Market of the South (MERCOSUR) was established in 1991 as the initial step in facilitating regional economic integration, and its current members are Argentina, Brazil, Paraguay, Uruguay and Bolivia. The adoption of this treaty is the culmination of the process initiated in 1955 to develop an economic integration area as suggested by CEPAL. Argentina and Brazil were deeply involved in this process and they agreed to adopt the first bilateral agreement (concluded in 1985), which they translated into a multilateral agreement. The focus of negotiations was mainly on trade liberalization.

MERCOSUR is a treaty-based organization (the founding documents are the Treaty of Asuncion (1991) and the Protocols of Ouro Preto (1994) and Olivo (2002)).<sup>29</sup> From an institutional perspective, Mercosur is an intergovernmental organization (the executive body is the Common Market Group organized around 14 working groups), without a judicial authority. Even though there is no formal supranational dimension, MERCOSUR’s dynamic of consultations,

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26 Dirk Pulkowski, Theoretical Premises of ‘Regionalism and the Unity of International Law, European Journal of International Law, Conference Paper Series No. 16/2012, 2012.

27 Pulkowski, 2012.

28 Soderbaum, 2015.

29 According to Carlos, MERCOSUR developed following a “gradualist” approach. It originated, first, with the adoption of the bilateral agreement between Argentina and Brazil in 1986 (Acta para la integracion Argentino-Brasilena), then with the following agreement Tratado de integracion, cooperacion y desarrollo in 1988. The Tratado de Asuncion promoted the creation of a common market and the two protocols define the institutions and the dispute resolution.



meetings, and the network in place among governmental officials “produce a virtuous cycle and give continuity to the process” and “this provides a source of motivation to keep MERCOSUR alive and moving, especially in areas of low visibility where policy networks do not face intra-state struggles or external veto points, such as migration”.<sup>30</sup>

The normative framework includes the primary legislation (the obligations contained in the treaty) and secondary legislation (decisions, resolutions and directives) that require explicit transposition at domestic level.<sup>31</sup> According to Art. 40 of the Ouro Preto Protocols “norms will enter into force once all Member States have incorporated them into their domestic orders”. This approach can have negative consequences and it has been criticized for its lack of direct effect and the discretion left to national governments, in particular because as argued by Carlos “the less willing States determine when a norm will enter into force”.<sup>32</sup>

## **ASEAN**

ASEAN is an inter-governmental international organization that was formed in 1967 with the adoption of the Bangkok Declaration to develop economic growth and to promote peace and stability.<sup>33</sup> The Declaration laid the basis for a “skeletal institutional structure” and the approach adopted was to avoid the development of a supranational authority but to inform the regional process through two key principles: non-interference in domestic affairs and the principle of consensus in decision-making.<sup>34</sup> The Adoption of the ASEAN Vision 2020 in 1997 enabled the regional process to be organized around three pillars: the ASEAN Economic Community (AEC), the ASEAN Security Community

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30 Margheritis, Piecemeal regional integration in the post-liberal era: negotiating migration policies within Mercosur, *Review of International Political Economy*, 2013.

31 Carlos Closa and Lorenzo Casini, 2016. See, as highlighted by Closa, the MERCOSUR’s Permanent Revision Tribunal in 2008 stated that “MERCOSUR law is not domestic law of State Parties (or conventional international law). This is a new species distinct from them and which, despite its embryonic state, obliges States Parties to comply due to the free expression of their will reflected in the Treaty of Asuncion and the Protocols of Ouro Preto and Olivos and additional rules under national law and internationally”.

32 Carlos Closa and Lorenzo Casini, 2016. See also Torrent R. and Lavopa F., *La producción del derecho de integración en América Latina: un talón de Aquiles del MERCOSUR reproducido en la Unión de Naciones Sudamericanas*, in *Integración regional en América Latina: desafíos y oportunidad* (New York and Geneva, UNCTAD, 2010), 100-115.

33 The declaration was adopted by five countries (Indonesia, Thailand, Malaysia, Philippines, Singapore), Brunei signed it in 1984, Vietnam, Laos, Myanmar, and Cambodia between 1995 and 1999.

34 Chesterman Simon, *Does ASEAN exist? The Association of Southeast Asian Nations as an international legal person*, *Singapore Yearbook of International Law*, 2008, 199-211.



and the ASEAN Socio-Cultural Community. For the establishment of each pillar a roadmap was adopted in 2007 (a so-called blueprint) to guide full implementation of the ASEAN integration process in 2015.

A key element in the building of the ASEAN architecture was the adoption of the ASEAN Charter in 2007.<sup>35</sup> This binding instrument emphasizes the role of law and institutions as key tools for implementing the regional integration project.<sup>36</sup> In the words of Cremona et al. "the regional architecture promoted by ASEAN is regionalism according to the 'ASEAN way' and its methodology characterises these broader regional processes, which tend to be based on dialogue and declarations rather than formal institutions and treaties".<sup>37</sup> The "ASEAN way" has been "the modus operandi" of governance adopted by the ASEAN member states to develop informal, non-legalistic approaches since its creation in 1967.<sup>38</sup> Some scholars, for example Tay, have conducted interesting analyses of the significance of the adoption of the Charter and have described how its introduction can advance, for instance, the implementation of human rights by strengthening ASEAN's institutional component. Now ASEAN member states have agreed to international and regional standards on human rights, moving on from a domestic approach.<sup>39</sup> There is an emerging optimism, albeit cautious, that the adoption of the ASEAN Charter will facilitate the development of a regional order "based on shared norms, agreed rules and sufficient institutionalization".<sup>40</sup>

### **3. Regional "laboratories" and their impact on migration standards**

The previous section introduced the contemporary discourse regarding whether regionalism is a "stumbling block or building block" with respect to the development of international law and the desirability of developing regional legal orders to accomplish broader goals, such as protecting human rights or promoting free movement of individuals. The following section explores in more detail the question of whether the development of regional processes results in creation of migration standards.

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35 Tay Simon, *The ASEAN Charter: between national sovereignty and the region's constitutional moment*, Singapore year of International Law and Contributors, 12 (2008), 151-170.

36 Cremona et al. 2015.

37 Cremona et al., 2015, p. 18

38 Tay, 2010.

39 Tay, 2010.

40 Tay, 2010.

The emergence of regional norms in migration law is increasingly visible. This shift to regional negotiations can be explained by the fact that states are increasingly reluctant to enter into multilateral negotiations, which can be slow. In this scenario, negotiations conducted at regional level can facilitate better outcomes and subsequently offer the foundations for building new international agreement.<sup>41</sup> Especially when it comes to sensitive areas, such as migration movements, dominated by sovereign concerns, these negotiation processes can provide “test laboratories” for developing new standards.<sup>42</sup>

According to Dutheil de la Rochere, regionalism can impact the development of the law in different ways: it can play a “role de veille” (vigilance role) to deal with specific risks that a national state cannot face alone (e.g. criminality). Alternatively, it may facilitate “experimentation” (experimentalist approach) – as was the case of international trade. It originated among a group of neighbouring countries (Benelux) to identify potential challenges, or for “identification plus precise du besoin” (identification of specific need) to enable the countries involved to respond more successfully. Also, Jenks, in his analysis, identifies several advantages related to the role of regional instruments, for example, that they “can provide for concerted action in a particular region representing the first step towards the implementation of an international standard which sets a standard, or provides for obligations, which it is not still practicable to apply in that region without substantial modifications”.<sup>43</sup>

The legal quality of the instruments adopted in the migratory context by each regional project is different. The analysis will address different categories of instruments: memoranda of understanding, declarations, and binding agreements in order to understand and clarify the nature of legal obligations endorsed by member states. Different principles can orient the content of these instruments: namely, harmonization, coordination, and mutual recognition.

The harmonized standards are legally binding in most cases and this requires the adoption of domestic measures. In the case of mutual recognition, “countries recognize one another’s standards or technical regulation”. This is true of mutual recognition agreements (MRAs) introduced to facilitate the mobility of highly skilled migrant workers. As stated by Mattoo in “many cases, harmonization of substantive standards may be deemed neither feasible nor desirable. Countries may nevertheless choose at least to mutually recognize each other’s conformity assessment requirement”. More interestingly, Toy describes how the ASEAN Charter reflects a constructivist approach to

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41 Cho Sungjoon, Breaking the barrier between regionalism and multilateralism: a new perspective on trade regionalism, *Harvard International Law Journal*, 42, n. 2, 2001, 419-467.

42 Cho Sungjoon, 2001.

43 Jenks, 1953.

regionalism by helping domestic states to internalize new norms adopted at the regional level.<sup>44</sup>

## MERCOSUR

As mentioned above, the MERCOSUR treaty was initially conceived to facilitate the economic integration process through the promotion of “free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures” (Art. 1). There was no explicit reference to labour mobility even though some scholars interpreted labour as “factors of production” and this facilitated the promotion of labour mobility.<sup>45</sup>

The role of labour mobility gained increasing relevance from 1992 to 1995, as reflected by the development of Mercosur’s institutional architecture. Subgroup 11 explicitly addressed the role of labour mobility in the regional integration project.<sup>46</sup> The SGT 10, created in 1995, was required to develop comparative analysis of domestic legal orders to move towards progressive harmonization. After a long debate, in 1998 a Socio-labour Commission was created in addition to the *Grupo de Liberalizacion de la Comercializaacion de servicios en la region*.

The regulatory framework linked to human mobility evolved significantly between the 1990s and the 2000s and it is particularly relevant to understand the role played by the regional integration process.<sup>47</sup>

The first instrument to be mentioned is Decision 48/00 adopted in 2000 to promote the free movement of highly skilled migrant workers among Mercosur member states by the adoption of a visa waiver agreement.<sup>48,49</sup>

44 Toy states that “the role of the Charter is to force the states to accept – by ‘speech acts’ and then by internalization – new norms, democracy and human rights among them, together with a single market that is rules-based”.

45 Belen Olmos Giupponi, Citizenship, migration and regional integration: re-shaping citizenship conceptions in the Southern Cone, *European Journal of Legal Studies*, 2011; Vichich, *El Mercosur y la migracion internacional*, Expert group meeting on international migration and development in Latin America and the Caribbean, UN/POP/EGM-MIG/2005/05, 2005.

46 Nora Perez Vichich, *Fundamentos Teoricos del tratamiento de la movilidad de personas en Mercosur*, Entelequia, Revista Interdisciplinar, 2007.

47 Vichich, 2007.

48 Acuerdo sobre exencion de visas entre los estados partes del mercosur. According to this agreement no visa is required for selected categories of highly skilled migrant workers for a stay of 90 days.

49 Bernal et al., Intra regional mobility in South America: the Andean community and Mercosur, in Panizzon et al. the *Palgrave Handbook on Labour Mobility*, 2015.

As argued by Margheritis “the conceptualization of migration issues progressively passed from purely economic understanding of the need and implications of the free circulation to a socio-political view of the movement of people that reflects both national and regional considerations”.<sup>50</sup> This trend facilitated the emergence of a positive dialogue and an increase in human rights protection of migrant workers by adopting specific instruments, such as the Charter of Fundamental Rights in 1994, the Multilateral Agreement on Social Security in 1997, and the MERCOSUR Socio-Labour Declaration in 1998.<sup>51</sup>

The adoption of the MERCOSUR Regularization and Residence Agreement in 2002 (Decision CMC 28/02 and agreement 14/02) is significant in the regionalization process since it introduces the “concept of freedom of residence”.<sup>52</sup> This agreement is an important step towards the recognition of the principle of equality in the enjoyment of rights for MERCOSUR citizens (Art. 9).<sup>53</sup> At the same time, the so-called open-doors policy introduced positive discrimination between Mercosur citizens and non-Mercosur citizens.<sup>54</sup> It granted the inclusion at domestic level of a new category of residence “based on nationality”: in fact “possessing the nationality of one of these signatory countries became sufficient” to allow movement within the territory of the member states, but at the same time it is noteworthy that this agreement did not start the process of eliminating the internal borders, as in the case for instance of the European Union. So any time a citizen wants to move from one country to another he/she has to submit all the documents necessary to apply for a residence permit or he/she will be not entitled to move freely within the regional context.<sup>55</sup>

Another significant step was the adoption of the Council Decision 64/10 to develop a Mercosur Citizenship by 2021, which started a new “phase in the integration of MERCOSUR countries” by promoting the adoption of more

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50 Margheritis, 2013.

51 Vichich, 2005.

52 Art. 8 “freedom of residence” implies freedom of movement, transit, stay and departure within Member States, and should be achieved through the harmonization of Member States “legislation”. Bernal et al. 2015.

53 Varela, J.C., Evolucion de la libre circulacion de personas en el mercosur y su impacto en las politicas migratorias nacionales, in. Vertiz Juana Goizueta, fernandez Gomez Itziar, Maria Isabel Goanzales Pascual (eds) La libre circulction de personas en los sistemas de integracion economica modelos comparados, Union europea, mercosr y comunidad andina, Thomson Reuters aranzadi, 2012.

54 Nicolao Julieta, La integraci3n regional en la pol3tica migratoria argentina 3nfora, vol. 18, n3m. 31, julio-diciembre, 2011, pp. 101-121, 2011.

55 As confirmed by the interviews conducted with migrant workers, academia, and international organizations.

comprehensive migration policies and by increasing the attention paid to the protection of migrant workers' human rights.<sup>56</sup>

In this framework, the Specialized Forum on Migration (Foro Especializado Migratorio del MERCOSUR) established in 2003 played a significant role in the drafting and promoting of regional migratory standards.<sup>57</sup> These included the subsequent adoption of the Santiago Declaration on Migratory Principles in 2004, elaborated by the Government of Argentina and approved by other states.<sup>58</sup> The regional framework is playing a particularly relevant role in the implementation of a human rights approach to migrants. As confirmed during the interviews, the regional layer is helping MERCOSUR member states to increase the standards adopted at domestic level, as in the case of the application of the advisory opinion of the Inter-American Court on the protection of migrants' children.<sup>59</sup> The regional platform allows the adoption of uniform and common standards in the context of domestic migratory provisions.<sup>60</sup> The majority of interviews with academia and IOs, confirmed that the international–regional process is not a top-down or a bottom-up approach, but a reciprocal interaction.

The case of Mercosur demonstrates in concrete terms how regional economic integration requires inclusion and modification of migration policies to “accommodate the realities and demands of regional markets and communities”.<sup>61</sup>

## **ASEAN**

The development of the ASEAN agenda on mobility reveals a prevailing market-centred approach and a strict relationship with the development of the regional trade agenda.<sup>62</sup>

With the aim of building the ASEAN Economic Community, labour mobility in the region was approached in the regional trade agreement concluded in 1995 (the ASEAN Framework Agreement on Services – AFAS). Within the AFAS, member states negotiated eight packages of commitments, adopted in Hanoi in 2010, as well as “laying down Mode 4 conditions for market access and

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56 Ceriani P., *Migration, Citizenship and Free Movement in South America: a rights-based analysis of regional initiatives*, Paper presented at the UNRISD Conference, Regional Governance of Migration and Socio-Political Rights: Institutions, Actors and Processes, 14-15 January 2013, Geneva.

57 See interviews conducted with academia.

58 Giupponi, 2011; Nicolao, 2011.

59 See interview with IO.

60 See interviews with academia and IOs.

61 Margheritis, 2013.

62 See the interview with a government official from the Ministry of Trade in Thailand.

national treatment under horizontal commitments”.<sup>63</sup> The scope of this agreement does not go beyond the commitments under the General Agreement on Trade in Services (GATS); it excludes permanent mobility and it facilitates selected access within the domestic legislation of member states, which retain full sovereignty over the entry and stay of migrant workers. The implementation of this instrument is quite different across the countries of the region.<sup>64</sup>

In 2012, the Agreement on Movement of Natural Persons (AMNP) was signed with commitments that privilege specific categories: namely, intra-corporate transfers and business visitors.<sup>65</sup> In addition, the ASEAN Comprehensive Investment Agreement, entered into force in 2012, and its investment chapters include specific provisions aimed to promote the mobility of professionals by facilitating the issuance of visas and of employment passes for ASEAN’s skilled workforce.

More recently, the agenda of free movement was framed as one of the key priorities of the ASEAN Economic Community with the aim to promote the progressive liberalization of movement of highly skilled migrant workers<sup>66</sup> by December 2015.<sup>67</sup> Art. 33 of the AEC blueprint recalls that the aim is to “facilitate the issues of visas and employment passes for ASEAN professionals and skilled labour who are engaged in cross border trade and investment related activities in accordance with the prevailing regulations of the receiving countries”.

To facilitate the mobility and regional integration of qualified and certified professionals, several MRAs (Art. V AFAS)<sup>68</sup> have been signed. They address specific categories of migrant workers: engineers, nurses, architects, medical professionals, dentists, and workers in the tourism industry.<sup>69</sup> These

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63 Jurje Flavia and Lavenex Sandra, ASEAN Economic Community: what model for labour mobility? Working Paper n. 2015/02, January 2015.

64 In 2015, only 7 countries had ratified it and the agreement is therefore not in force.

65 The only exception is Vietnam, which allows the mobility of contractual services suppliers. Jurje and Lavanex, 2015.

66 The AEC aims to create a region with “free movement of goods, services, investment, skilled labour, and freer flow of capital” (AEC Blueprint, 2008).

67 Ruhs Martin, Preparing for increased labour mobility in ASEAN: Labour markets, immigration policies and migrant rights, USAID and IOM, 2016.

68 A distinction needs to be made between MRAs per se (that include concrete measures to facilitate labour mobility) and framework MRAs (mainly providing principles for the negotiations of further bilateral or multilateral agreements).

69 Eight MRAs were adopted between 2006 and 2012. Art V of AFAS: “Each member state may recognise the education or experience obtained, requirements met, or licenses or certifications granted in another member state, for the purpose of licensing or certification of service suppliers. Such recognition may be based upon an agreement or arrangement with the Member State concerned or may be accorded autonomously”. For instance a foreign tourism professional wishing to work in a host country needs to

arrangements aim at recognizing the educational qualifications and certifications obtained in other ASEAN member states.<sup>70</sup> In this framework, specific regional bodies (e.g. Chartered Professional Coordinating Committees) have been created to recognize the respective qualifications, but their operationalization is still slow.<sup>71</sup>

The study published by the Asian Development Bank and the Migration Policy Institute in 2015 emphasized the peculiar challenges faced by the ASEAN member states when implementing these agreements: first, the qualification recognition process is very complex and domestic normative reality risks compromising its implementation; second, specific domestic barriers that prevent foreigners from gaining access to specific professions reserved for nationals persist.<sup>72</sup>

The ASEAN mobility agenda makes significant efforts to target highly skilled migrant workers but no effective effort is made to develop a broader framework to address the movement of unskilled migrant workers, even though, according to the ILO, the majority of migrants in the region are low-skilled.<sup>73</sup> Few bilateral agreements, adopted in the non-binding form of memoranda of understanding, are in place to regulate intra-regional mobility.<sup>74</sup>

#### **4. Challenges and promises of regionalism: a domestic perspective**

Very interesting studies have explored the normative dialogue in place between the national and the regional layer. Such studies mainly seek to understand whether the respective formulation is inspired by a cooperative approach or replicates domestic prerogatives at a supranational dimension. The work conducted by Lavenex at the European level seems to confirm that EU migratory measures replicate the closure more than the openness of national policies, but this analysis is poorly developed in other regional contexts. What is clear is that regional processes have the advantage that they can be more effective than global initiatives because this platform gives states the

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apply for a tourism competency certificate issued by the Tourism Professional Certification Board. For certifying qualifications the mechanism in place involves the following bodies: Professional Monitoring Committee, Professional Registration System, National Professional Board, Professional Certification Board.

70 See interview with government official, Ministry of Trade.

71 See interviews with academia and IOs.

72 ADB, *Achieving skill mobility in the ASEAN Economic Community, Challenges, Opportunities and Policies Implications*, 2015.

73 See interview.

74 See interview with academia.



opportunity to engage in less complex negotiation processes than at the global level and to benefit from an easier confidence-building basis.

It is important to recall, as Ghosh emphasizes, that "intra-regional migration asymmetry is often too important to be contained or managed within the limits of each specific region" and weaker states may prefer to be involved in the multilateral drafting process to avoid having to face "the hegemonic influence of dominant states within a regional grouping" (Panizzon, 2016).

The fieldwork conducted at the domestic level in Argentina and Thailand explored how the progressive adoption of migration regulation is or is not influenced by the regional framework and how this impacts on the protection of migrant workers' human rights.

## **Argentina**

In 2005, Argentina was the top destination of intra-regional migration in the region, with 1.5 million migrants from neighbouring countries (Bolivia and Paraguay).<sup>75</sup> The case of Argentina offers the opportunity to introduce a different perspective on the role played by the regional dynamics. Instead of assisting a progressive denationalisation of migratory policies within a regional context, several scholars identify a domestic aptitude to foster the regionalization of migratory rules and to establish a stronger dialogue with neighbouring countries.<sup>76</sup> Argentina played a "leading role" in the negotiations of migratory policies at regional level by stimulating the adoption of norms and procedures to facilitate free movement and equal rights.<sup>77</sup> Moreover, Giupponi defined Argentina as a "sub-center for regional migration". Giupponi placed an explicit focus on human rights protection and regional integration to understand the impact of this process at national level. Although Argentina is clearly emerging as a progressive example, this situation is not the same in other MERCOSUR states.<sup>78</sup>

It is possible to identify a clear shift in the migratory discourse at domestic level, from migration control to migration promotion to establish the so-called "open doors" policy.<sup>79</sup> As stated by the National Director of Migration, Rodriguez, "La legalidad constuye la base de toda sociedad democratica y es la unica forma de que el extranjero logre su integration plena a la comunidad

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75 Acosta D. and Geddes A., *Transnational Diffusion or Different Models? Regional Approaches to Migration Governance in the European Union and Mercosur*, *European Journal of Migration and Law*, 2014, 16, 19-44.

76 See the majority of interviews conducted with academia.

77 Margheritis, *Piecemeal regional integration in the post-liberal era: negotiating migration policies within Mercosur*, *Review of International Political Economy*, 2013.

78 See interviews with academia.

79 Nicolao, 2011; see interviews with academia.

de recepcion. Desde lo etico estamos convencidos que Argentina debe evolver a su politica migratoria amplia". The official discourses clearly identify a progressive role played by the regional process in the development of the migratory regulations to facilitate the adoption of bilateral and regional instruments, rather than promoting unilateral and restrictive measures.<sup>80</sup> Nicolao in her analysis argued that the migratory policy in Argentina is the result "de la decision politica nacional de imprimir una perspectiva regionalista a su politica migratoria".<sup>81</sup>

In this context, a significant result was the new Migratory Law adopted by Argentina in 2004, where the role played by the regional process is expressly mentioned.<sup>82</sup> This new law recognizes migration as a right and "embodies the transition from the negative view of immigrants as a threat" (migration control) to a "positive characterization of immigrants that values their economic and cultural contributions to a host society".<sup>83</sup>

In Argentina, migrant workers have formally equal access to health, employment, and education services.<sup>84</sup> Argentina has also implemented broad programmes of regularization (Patria Grande, a programme developed by MERCOSUR). Furthermore, some Argentinian localities permit legal Mercosur residents to vote at municipal level. The implementation of cross-border transit cards facilitates entry for Mercosur residents living within a certain distance of the borders. In addition, Art. 23 of the law adopts as legal criteria the nationality. That allows to all citizens of MERCOSUR to receive the permit of stay on the basis of this criteria.<sup>85</sup> However, the concrete implementation of this "freedom of residence" risks being compromised by the fact that not all Mercosur member states provide ID documents to their citizens.<sup>86</sup>

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80 See interviews with academia.

81 Nicolao, 2011.

82 'El principio de igualdad de trato no se considerara afectado por la posibilidad que tiene el Estado, conforme a los procedimientos establecidos en la Constitution y la leyes, de firmar acuerdos bilaterals de alcance general y parcial, que permitan atender fenomenos especificos, come el de la migracion laboral fronteriza, ni por la posibilidad de establecer esquemas diferenciados de tratamiento entre los paises que con la Argentina forman parte de una region respect de aquellos paises que resulten terceros dentro del proceso de regionalizacion, priorizando las medidas necesarias para el logro del objective final de la libre circulation de personas en el Mercosur' (Art. 18, Law 25.871 /04). Vichich Nora Perez, Los trabajadores migrantes en la nueva ley de migraciones: de objecto de normas a subject de derecho, in Giustiniani, Migracion: un derecho humano.

83 Margherities, 2013

84 See the interviews with migrant workers.

85 See the interviews with migrant workers.

86 See the interviews with migrant workers.

The interviews conducted with migrant workers reveal that in practice several barriers that affect the enjoyment of their rights persist.<sup>87</sup> Citizens from Mercosur have to provide a significant amount of paperwork to obtain residence permits and ID documents, which can affect their mobility.<sup>88</sup> There is a growing concern that the recent change of the government early in 2016 will have a negative impact on the current situation. Some interviewees for instance raised concerns that this could have negative implications for the protection of human rights.<sup>89</sup>

## **Thailand**

There has been limited progress in the ASEAN region on the harmonization of domestic regulation of the movement of migrant workers. According to the ILO, Thailand is a “key destination” for an increasing number of migrant workers, in particular those employed in low-skilled jobs.<sup>90</sup> This is the result of the rapid economic development in the manufacturing sectors due, in particular, to foreign direct investments from Japan, Europe and the United States.<sup>91</sup>

Thailand has developed quite an “open” regime to deal with highly skilled migrants<sup>92</sup> but it has in place stringent restrictive policies to regulate the admission and stay of unskilled migrant workers.<sup>93</sup> It is noteworthy that according to a recent study conducted by IOM and USAID, the regional process of liberalization of skilled labour mobility did not lead to any changes of Thai immigration laws.<sup>94</sup>

The mobility of skilled migrant workers is regulated through two programmes: the work permit programme<sup>95</sup> and the board of investment scheme.<sup>96</sup> In

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87 See the interviews with migrant workers.

88 Pizarro, Migration policies and state control in Argentina: experiences of vulnerable Bolivian women who cross the borders, *Geography, Environment, Sustainability*, 8, 2, 2015; See interviews with academia.

89 Pizarro, 2015.

90 ILO, Thailand, Quarterly Briefing Note, 2016.

91 Paitoonpong Srawooth and Chalamwong Yongyuth, Managing international labor migration in ASEAN: a case of Thailand, Thailand Development Research Institute, 2012.

92 Thailand adopted several free trade agreements outside the ASEAN region to increase and facilitate labour mobility. See for instance the FTAs concluded with the EU, Japan, China, India, USA, Peru, Australia, New Zealand and South Korea.

93 See the Immigration Act B.E. 2522 adopted in 1979 and modified in 1992. As a preliminary consideration, it is important to recall that the implementation of international law at domestic level, as can be the case with a regional legal regime, is regulated by the Thai domestic constitution. But, as noted by some authors, there is a “scare doctrine” on how to provide guidance to apply it in concrete terms.

94 Ruhs, 2016.

95 This programme regulates the admission of skilled migrant workers, limiting the number to 10 workers per company.

Thailand, the negotiations of AFAS are led by the Ministry of Trade, even though the implications for migration require the involvement of the Ministry of Labour to ensure the development of an appropriate legal framework for the processing of visa applications.<sup>97</sup> In addition, bilateral agreements have been concluded as memoranda of understanding on employment cooperation to facilitate the regular movement of migrant workers, signed with Cambodia, Laos and Myanmar, and more recently with Vietnam (in 2015).<sup>98</sup>

The domestic legislation is oriented to facilitate temporary labour mobility by not recognizing for instance the right to family reunification and by limiting the possibility for the member of the migrant's family to live together in the destination country and to obtain a work permit.<sup>99</sup> Also, it is interesting to note that the visa for obtaining a work permit is called a "non-immigrant" visa to highlight the temporary nature of the stay of all migrant workers.<sup>100</sup>

The implementation of MRAs in Thailand is quite complex. This is due to several domestic barriers that are preventing the full development of labour mobility. An interesting study conducted by Kittrakulrat et al. in 2014 reviewed for instance the current implementation of the ASEAN recognition arrangement for the medical profession to highlight the emerging scenario, with a focus on Thailand's situation. In the case of medical qualifications, there is a lack of information to ensure "fair exchange".<sup>101</sup> First, this is related to the prevailing nationalistic approach to specific national professionals, such as doctors. Second, national treatment limitations also affect specific professions, such as accounting or auditing, reserved to nationals. Finally, difficulties have also arisen for linguistic reasons.<sup>102</sup> For instance, according to MRAs, nurses from ASEAN countries can practise in Thailand but to do so they have to pass the national exam in the Thai language.<sup>103</sup> Likewise, the language used for the national medical qualification system is Thai. The direct result of this ineffective process is that qualified doctors from ASEAN member countries are employed in Thai hospitals in different roles, for which they are usually over-qualified, and they have no chance to work as doctors.

The protection of migrant workers' human rights is a key issue in the country. Several reports have been published in recent years that denounce the

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96 Ruhs, 2016.

97 See interview with government official, Ministry of Trade.

98 Paitoonpong Srawooth and Chalamwong Yongyuth, 2012.

99 See interviews with academia.

100 See interviews.

101 Kittrakulrat and al, the ASEAN economic community and medical qualification, in Global Health Action, 2014.

102 See the majority of interviews with migrant workers.

103 Jurye and Lavenex, 2015.

exploitation of migrant workers, in particular in irregular situations, in specific sectors, such as in the fishing industry.

The protective framework is also not properly effective for regular migrant workers admitted under migration programmes. The interviews revealed persistent legal gaps in equal access to social protection, for example, to health care, and the exportability of pensions, that affect the migrants' decisions and the possibility for migrant workers to return to their countries of origin. Restrictions are also in place on granting permanent residence status and this can limit the possibility for migrant workers to buy a property or to get loans.

## **5. Conclusion**

Recent legal developments reveal how different kinds of regional arrangements seeking to regulate migratory flows are proliferating with different degrees of success. The analysis reveals how regions are playing a relevant role in the current system of global governance to complement what is described by Fawcett as the current “world of states” with a “world of regions”<sup>104</sup> to advance with respect to specific issues, such as migration, where global institutions and mechanisms are absent. This paper develops a different reading on regionalism by exploring the positive influence of these processes on the development of migration regulation.

The conventional debate between regionalism and universalism in this specific context seems to cast a positive light on the role played by regional regimes. In particular, it promotes the adoption of more favourable norms for migrant workers and it can achieve a progressive harmonization of domestic standards facilitated by the regional integration process. The analysis focuses on the importance of regionalism as a strategy for “nurturing” special norms in the contested and monopolized domain of migration and eventually to “implant” them at the global level.<sup>105</sup> Both case studies are illustrative of a growing interest in cooperation in the context of migration – developing specific treaty regimes with a regional dimension. This constructive perspective identifies regionalism as “the glue” that can link different normative layers together, to facilitate their interaction and enable them to adjust to future circumstances.

Against this background, the evolutionary relationship between regional and international law appears reciprocal. Not only can regional law influence the development of international law but also international law can influence

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104 Fawcett, 2012.

105 Pulkowski, 2012.

regional rules. The progressive solidification of regional migration governance will help to overcome the potential tensions between regionalism and universalism identified in international law.

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